Supreme Court, U.S.
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Nos. 84-6846, 84-6935, 84-6949 and 85-76

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM P. KIRBY, PETITIONER
v.
UNITED STATES OF AMERICA

MILTON GREENSPUN, PETITIONER
v.
UNITED STATES OF AMERICA

JOSEPH BALCHAITAS, PETITIONER
v.
UNITED STATES OF AMERICA

ROBERT B. GRAHAM, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's supplemental "*Allen*" charge amounted to plain error.

2. Whether, on the record in this case, the jury's verdict was coerced.

3. Whether petitioners' tax protest activities were protected under the First Amendment.

4. Whether the district court erred in excluding certain tape recordings from evidence as irrelevant and prejudicial hearsay.

5. Whether the government's evidence and the district court's instructions relating to the falsity of petitioner Balchaitas's Form W-4 were sufficient.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-24)[1] is reported at 758 F.2d 879.

[1]"Pet. App." refers to the appendix to petition No. 85-76.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1985. On April 22, 1985, the court of appeals denied petitions for rehearing filed by petitioners Kirby, Greenspun and Balchaitas; on May 2, 1985, it denied petitioner Graham's petition for rehearing (Pet. App. 1b-2b). The petitions for a writ of certiorari were filed on May 14, 1985 (No. 84-6846), June 20, 1985 (No. 84-6949), June 21, 1985 (No. 84-6935) and July 1, 1985 (No. 85-76). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted of conspiring to defraud the United States by impeding, impairing and obstructing the Internal Revenue Service in the ascertainment, computation, assessment and collection of their own and others' federal income taxes, in violation of 18 U.S.C. 371. Petitioner Balchaitas also was convicted on one count of filing a false form W-4 with his employer, in violation of 26 U.S.C. 7205, and on one count of willful failure to file a tax return, in violation of 26 U.S.C. 7203. Petitioner Graham also was convicted on two counts of assisting the preparation and filing of false and fraudulent tax returns, in violation of 26 U.S.C. 7206(2). All four petitioners received suspended sentences and were placed on probation; all four subsequently violated the conditions of the probation and were incarcerated.

1. The evidence at trial showed that petitioners were leaders of the so-called "Committee for Constitutional Taxation" (CCT), and in that capacity conducted seminars at which attendees were instructed to avoid withholding and payment of income taxes by filing false Forms W-4 and so-called "Fifth Amendment returns" that disclosed little or no information. Attendees also were instructed to avoid

paying taxes by investing in foreign currency and by maintaining foreign bank accounts, and were urged to impede and disrupt Internal Revenue Service (IRS) audits and grand jury investigations. Pet. App. 4a. In particular, Kirby gave attendees detailed instructions on filling out "Fifth Amendment returns" (Supp. App. 250sa-254sa, 264sa),[2] reviewed the returns before they were filed (*id.* at 255sa-256sa, 265sa, 285sa) and accompanied some of the more timid attendees to IRS offices when they filed their returns (*id.* at 291sa). Similarly, Balchaitas distributed brochures advocating use of techniques for circumventing tax and currency reporting laws (*id.* at 50sa-55sa).[3] A number of attendees filed false Forms W-4 or "Fifth Amendment returns" as a result of this coaching (see *id.* at 270sa-277sa).

A significant portion of the government's evidence at trial was offered in the form of testimony by IRS agents who had attended CCT seminars while operating undercover. At the close of the government's case, Kirby and Greenspun offered as evidence several tape recordings made by the agents during the investigation. These were excluded by the district court as hearsay that was, in any event, irrelevant and unduly prejudicial. Supp App. 334sa-335sa; Bal. App. 130a-134a.

On Monday, September 12, 1983, the seventh day of trial, one of the jurors sent the district judge a note requesting that the jury be dismissed by 4:00 p.m. on Friday, September 16, to permit observance of the Yom Kippur holiday (which began on the evening of September 16). The judge

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[2]"Supp. App." refers to the supplemental appendix filed in the court of appeals. "K. App." and "Bal. App." refer to appendices filed in the court of appeals by Kirby and Balchaitas, respectively.

[3]Greenspun and Graham engaged in similar activities. See Supp. App. 1sa, 9sa-15sa, 74sa-79sa, 81sa-82sa, 87sa, 89sa-92sa, 98sa, 154sa, 174sa, 240sa-241sa, 318sa-319sa.

did not directly respond to the note, and the request was not renewed by the jury. Pet. App. 5a. The jurors retired to deliberate two days later, on Wednesday, September 14. At 11:00 a.m. on Friday, September 16, the jurors sent another note to the judge, indicating that after some 17 hours of deliberations they remained deadlocked on all but two of the 36 counts against petitioners. Without objection from counsel, the judge then gave a supplemental charge directed at breaking the deadlock. Counsel for Kirby, however, requested that the jurors be informed that they need not reach a verdict before recessing for Yom Kippur; the court accordingly instructed the jury that " 'there are no time deadlines within which you must reach your verdict.' " In response to a subsequent motion, the court declined to give a more explicit instruction on this point. *Id.* at 5a-7a (citation omitted).

At 3:20 that afternoon the jury announced that it had reached guilty verdicts on eight of the 36 counts. The judge accepted that verdict, dismissing without prejudice the 28 counts on which the jurors were unable to reach agreement. Pet. App. 8a.

2. The court of appeals affirmed (Pet. App. 1a-15a). It rejected petitioners' challenge to the district court's use of a supplemental "*Allen*" charge (see *Allen* v. *United States,* 164 U.S. 492 (1896)). While recognizing that it had disapproved use of an *Allen* charge in *United States* v. *Fioravanti,* 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969) (see Pet. App. 9a), the court noted that petitioners had failed to make a timely objection to the charge before the district court (*id.* at 9a, 10a). And the court of appeals found that the district court had not committed plain error in giving the *Allen* instruction because an "independent review of the entire record reveals that no manifest injustice resulted from the court's instruction" (Pet. App. 10a).

The court of appeals also held that the district court did not abuse its discretion in its response to the jury's concern about the pendency of Yom Kippur. The court of appeals found "no evidence that the jurors were coerced to agree upon a verdict by the impending onset of the Yom Kippur holiday," noting that the jury reached no agreement on 28 of the 36 counts. Pet. App. 13a.[4] Petitioners' other contentions, so far as they are relevant here, were found by the court not to "merit discussion" (*id.* at 15a).

ARGUMENT

1. Kirby (84-6846 Pet. 13-17) and Graham (85-76 Pet. 7-16) contend that the district court erred in giving an *Allen* charge, noting that the Third Circuit has disapproved such instructions. In light of this Court's approval of the charge in *Allen* itself, however, as well as the repeated refusal of this Court to review cases challenging use of the charge, the question whether the district court's instruction was erroneous is of importance only in the Third Circuit. In any event, petitioners' failure to object made the district court's action reviewable only for plain error. Fed. R. Crim. P. 30, 52(b). The court of appeals found no such error in this case, and its factual findings on this point do not warrant further review.

Similarly, Greenspun's argument (84-6935 Pet. 17-20) that the court of appeals misapplied the plain error standard is without merit. The court of appeals expressly followed this Court's admonition to judge the claimed error "against the entire record" and to find it plain error only when the challenged action "undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of

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[4]Judge Higginbotham dissented on this ground, suggesting that the trial court's failure to advise the jurors that they would be released at 4:00 p.m. on September 16 was coercive "when viewed in the context of the jury's deliberations" (Pet. App. 18a).

justice." *United States* v. *Young,* No. 83-469 (Feb. 20, 1985), slip op. 14, 15. Compare Pet. App. 10a. The court of appeals made precisely that inquiry and found no such injustice in this case.

2. Greenspun (84-6935 Pet. 11-14) and Kirby (84-6846 Pet. 17) contend that reversal was warranted because the district court "coerced" the jurors into unanimity by failing to inform them that they did not have to return verdicts by 4:00 p.m. on Friday, September 16, to be released for Yom Kippur observances. This unusual and fact-bound issue was fully considered by the court of appeals, which found no evidence that the jurors were "influenced by a prescribed deadline or the approaching holiday" (Pet. App. 13a). To the contrary, on Friday afternoon the jurors remained deadlocked on 28 of the 36 counts, a factor that, the court explained, indicates that the jurors did not feel bound to reach agreement (*ibid.*). There is no reason to disturb this determination.

3. Kirby (84-6846 Pet. 1-8) and Balchaitas (84-6949 Pet. 5-6) contend that they engaged only in advocacy that is protected by the First Amendment. As the court of appeals explained, however, this implausible assertion does not warrant extended consideration. Kirby and Balchaitas gave detailed instructions on the completion of "Fifth Amendment returns" to persons attending CCT seminars. Kirby reviewed the returns after they were completed, and escorted attendees to IRS offices to file the returns; two witnesses testified that they were led to file false Forms W-4 and, in one case, a "Fifth Amendment return," by instructions given at meetings conducted by Balchaitas. These activities plainly involved participation in unlawful conduct rather than simple advocacy.[5]

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[5]Petitioners therefore can draw no support from *United States* v. *Dahlstrom,* 713 F.2d 1423, 1428 (9th Cir. 1983), cert. denied, No. 83-1297 (May 14, 1984). That case involved advocacy of the use of a tax

4. Kirby (84-6846 Pet. 9-12) and Balchaitas (84-6949 Pet. 6-7) also maintain that the district court erred by excluding from evidence the tape recordings offered by Kirby and Greenspun. Again, the contention lacks merit. Introduction of the tapes—which consisted largely of petitioners' views on the tax laws and diatribes against the government—could only have confused the jury about the state of the law; the district court therefore was correct in ruling that the tapes were irrelevant and unduly prejudicial to the government's case.[6] This factual finding, which the court of appeals determined did not warrant discussion, does not deserve further review.

5. Finally, Balchaitas contends (84-6949 Pet. 7-8) that the government failed to prove that his 1980 Form W-4 was false, and that the jury should have been instructed on the requirements for claiming exemptions from withholding

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shelter the legality of which "was completely unsettled." The court's holding in *Dahlstrom* accordingly indicated only that "the first amendment barred prosecution for advocacy of conduct which did not violate existing law." *United States* v. *Little*, 753 F.2d 1420, 1434 (9th Cir. 1984). That plainly is not the case here.

[6]The district court also was correct in excluding the tapes as hearsay. The tapes presumably were offered to establish the truth of petitioners' implicit assertion that they believed what they said about the tax laws; when the taped statements were made, petitioners were aware that they were the subjects of a grand jury investigation and that their meetings had been infiltrated by government agents (see Supp. App. 72sa, 224sa-225sa, 227sa-229sa). An out-of-court statement offered to prove the truth of such an "implied assertion[]" may "qualify[] as hearsay and [is] susceptible to hearsay objections." *United States* v. *Reynolds*, 715 F.2d 99, 103 (3d Cir. 1983). This case is thus distinguishable from *United States* v. *Abascal*, 564 F.2d 821 (9th Cir. 1977), cert. denied, 435 U.S. 953 (1978); *United States* v. *Herrera*, 600 F.2d 502 (5th Cir. 1979); and *United States* v. *Till*, 609 F.2d 228 (5th Cir.), cert. denied, 445 U.S. 955 (1980), on which Balchaitas relies (84-6949 Pet. 6-7); those decisions involved statements that plainly were not offered to prove the truth of the matters asserted. And in those cases relevance and undue prejudice were not—as they are here—independent grounds for the exclusion.

under 26 U.S.C. 3402(n).[7] The falsity of the Form W-4, however, which asserted that Balchaitas was exempt from withholding because he incurred no tax liability for 1979 and anticipated none for 1980, was not contested at trial.[8] That issue was raised for the first time in the court of appeals, which declined to discuss it. Similarly, Balchaitas failed to raise or preserve his challenge to the adequacy of the jury instructions before either of the courts below. In any event, the district court instructed the jury that it was required to find that the Form W-4 was false or fraudulent when submitted (K. App. 60A).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Balchaitas was convicted of violating 26 U.S.C. 7205, which makes it a crime willfully to provide false information to an employer; Section 3402(n) provides that an employee claiming exemption from withholding must certify that he incurred no income tax liability for the preceding year and that he anticipates incurring no tax liability for his current tax year.

[8]In any event, the evidence at trial showed that Balchaitas incurred tax liabilities in 1976, 1977 and 1978, and earned a substantial income in 1979. He filed a "Fifth Amendment return" in that year. See Supp. App. 16sa-33sa.